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IN THE

Supreme Court of the United States

October Term, 1966.

No. 533.

MENE GRANDE OIL COMPANY,
Petitioner,

v.

MOBIL TANKERS COMPANY S.A. and
SOCONY MOBIL OIL COMPANY, INC.,
Respondents.

RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

QUESTIONS PRESENTED.

1. Where the Circuit Court of Appeals reviews the findings of fact of the District Court on evidence consisting solely of affidavits, and reverses the decision of the District Court dismissing the suit on grounds of forum non conveniens, should certiorari be granted solely because the Circuit Court of Appeals failed to categorically state that the decision of the District Court was "clearly erroneous" where the opinion itself indicates that this conclusion was necessarily and correctly reached?

2. Should a United States citizen (New York corporation) and its Panamanian subsidiary be denied the right to maintain an action in admiralty against a Delaware corporation in the United States District Court for the District of Delaware, and, by dismissal on the ground of forum non conveniens, be relegated to recommencing the litigation in a foreign country?

STATEMENT.

On March 23, 1963, Respondent Mobil Tankers, S. A. (Mobil) filed a libel against Petitioner Mene Grande Oil Company (Meneg) in the United States District Court for the District of Delaware, seeking to recover (i) damage sustained by its vessel MOBIL ASTRAL as the result of an explosion and fire, and (ii) as bailee and on behalf of the owner, for damage to the cargo on the vessel. The explosion occurred at Meneg's terminal at Puerto La Cruz, Venezuela, and was alleged to have been due to the negligence of Petitioner.

Petitioner, Meneg, is a Delaware corporation, with a place of business in Pittsburgh, Pennsylvania, where most of the directors and principal officers reside, and where questions of management and policy are determined. It is engaged in the production and sale of petroleum products and derivatives, and substantially all its activities in this respect are transacted in Venezuela.

Socony Mobil Oil Company, Inc. (Socony) is a New York corporation duly authorized to do business in the State of Delaware. It owned the cargo damaged by the explosion and fire.

Mobil, a Panamanian corporation, is engaged in world-wide transportation by tank vessels of petroleum and its products. Its vessels are documented under Panamanian flag. It is a wholly owned subsidiary of Socony. At the time of the casualty it maintained an office in New Jersey, from which its operations were controlled and directed.

On April 10, 1963, Petitioner filed a Motion to Dismiss on the ground of forum non conveniens. The Motion was heard by the District Judge on June 23, 1964, on the basis of affidavits submitted by the parties, briefs, and argument by counsel.

On November 12, 1964, the District Judge granted the Motion to Dismiss. On November 18, 1964, Socony peti-

tioned for leave to be joined as an additional libellant and simultaneously a motion was made for reargument.

On December 16, 1964, the District Judge filed a supplemental opinion granting Socony's motion to intervene as a party libellant, but confirming the dismissal of the libel. Notice of appeal was filed on February 24, 1965.

On July 27, 1966, the United States Circuit Court of Appeals for the Third Circuit filed its opinion reversing the District Court on the grounds that Socony and Meneg are not "foreigners," but United States citizens; that the presence of Mobil as a libelant in no way changed the situation; that the evidence in the record is "plainly insufficient" to support the conclusion that retention of jurisdiction would result in manifest injustice to the Petitioner; and that "retention of jurisdiction would best serve the ends of justice."

ARGUMENT.

I.

There Is No Conflict in Opinion Between the Circuits Which Would Justify Certiorari.

Granting of certiorari on the ground of conflict between the several Circuit Courts of Appeal in the interpretation and application of F. R. C. P. 52(a) would be unwarranted because (i) while the opinions may contain minor differences in expression, the general rules applied by the several Courts, and the conclusions reached by them, indicate substantial accord in interpretation and effect; and (ii) in any event the law has been definitely settled by this Court in *United States v. United States Gypsum Co.*, 333 U. S. 364 (1947) rehearing denied, 333 U. S. 869 (1948).

In *United States v. United States Gypsum Co.* (*supra*) this Court said (P. 395):

> "Since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous.'"

It further said (P. 395):

> "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

No subsequent case questions the principles so announced, and it remains the controlling law on the subject.

The opinion of the Third Circuit Court of Appeals in the instant case follows substantially the principles established by *United States v. United States Gypsum Co.* (*supra*). The statement that the rule of F. R. C. P. 52(a)

is "inapplicable in the instant case" must be read in context with the opinion as a whole. The Circuit Court obviously believed, with reason, that the findings of fact of the District Judge were "clearly erroneous." For example the Court said (A-20):

> "The Court below seemingly treated the suit as one between foreigners in apparent disregard of the status of Socony and Meneg as citizens of the United States . . ."

It points out the undeniable fact that (A-19):

> "the suit between Socony and Meneg was one between citizens; the presence of Mobil as a libellant suing in its own right in no way changed this situation."

The conclusions of the lower Court that Mobil, as a subsidiary of Socony, was an "expatriate"; that Meneg although a Delaware corporation was only "nominally" so; that the interest of Socony as an American corporation was minimal, and that hence the suit was one between foreigners, spoke for themselves. They were "clearly erroneous" on the record, and the Circuit Court of Appeals so found.

The Court below obviously believed that the District Judge was clearly wrong in stating that the limitations of Venezuelan practice would not prejudice the rights of Socony. For purposes of this brief it is unnecessary to discuss in detail the questions of relative inconvenience and prejudice; but as a single example we point out that Respondents' witnesses to the happening of the casualty are foreign seamen, who are presently pretty well scattered over the world and not subject to subpoena by Venezuela Courts. Obviously much of this testimony will have to be taken by deposition which can be done efficiently under the practice of our Courts, but which is virtually impossible under Venezuelan procedure.

After considering all of the controversial points, the Court below said (A-24):

> "The evidence in the record is plainly insufficient to support a conclusion that the retention of jurisdiction by the district court would result in manifest injustice to the respondent. Indeed, we believe that the retention of jurisdiction would best serve the ends of justice."

There is no magic in the use of the words "clearly erroneous"; the test is whether the action of the Court is in compliance with *United States v. United States Gypsum Co.* (*supra*), and it is impossible to imagine more complete compliance than that shown in the opinion of the Third Circuit Court, viewed as a whole.

A review of the decisions of the several Circuits, including those cited in Petitioner's brief, indicates that there is consistency in the application of the rule even though there may be the inevitable differences in phraseology.

In *Texas v. O'Brien,* 242 F. 2d 526 (1st C. C. A. 1957), an admiralty action, the Appellate Court held that the evidence in the District Court failed to sustain an assessor's valuation of a vessel and, reversing, substituted its own valuation.

In *Mid-Continent Casualty v. Everett,* 340 F. 2d 65 (10th C. C. A. 1965), the Circuit Court set aside the fact findings of the lower Court saying (P. 70):

> "and the test is whether the reviewing Court is left with the definite and firm conviction that a mistake has been committed."

and (P. 71)

> "we are convinced from an examination of the entire record that a mistake has been committed and the judgment is therefore reversed."

There is certainly nothing in this opinion to indicate a disagreement with the opinion of the Third Circuit in the instant case.

Petitioner has quoted at length from the decision of *Olinick and Sons v. Dempster Brothers,* — F. 2d — (2nd C. C. A. 1966). That case primarily involved the applicabity of mandamus to compel transfer, pursuant to 28 USCA 1404(a), from one United States Court to another United States Court. It does not concern the question relating to review of fact findings within the applicability of F. R. C. P. 52(a), and has nothing to do with the denial of jurisdiction in this case.

Finally, it is submitted that the controlling point before the Third Circuit was a question of law, or at most a mixed question of law and fact. This question, of course, was the legal right of a United States citizen to maintain, in the proper venue in the United States, an action against another United States citizen. The right of an appellate court to reverse findings of law of the lower Court is not affected by F. R. C. P. 52(a), and remains a matter of sound discretion. See *United States v. United States Gypsum Co.,* 333 U. S. 364 at Pages 394 and 396.

In summary, we submit that there is no substantial conflict shown by the decisions of the several Circuits, and, in any event, certiorari is unnecessary because the interpretation and applicability of F. R. C. P. 52(a) has been settled by *United States v. United States Gypsum Co.* (*supra*).

II.

Certiorari Should Be Denied on Authority of Burt v. Isthmus Development Company, 218 F. 2d 353 (5th C. C. A. 1955), Cert. Den. 349 U. S. 922.

The decisive question in this case is the right of a United States citizen and its wholly owned Panamanian subsidiary to maintain a suit in admiralty against a Delaware corporation in the United States District Court for the District of Delaware. There can be no controversy in respect of the facts on this point; they are inherent in the record.

Properly viewed, dismissal of such a suit is an error of law and a final denial to Respondents of the right to obtain redress in any United States Court, which is actually a final denial of jurisdiction.

This case involves entirely different principles from those applicable to a dismissal in an action at law where an alternate United States Court is readily available: *Gulf Oil Corporation v. Gilbert,* 330 U. S. 501 (1947), or transfer of a cause of action from one court to another under 28 USCA 1404(a), *Olinick v. Dempster* (*supra*).

In *Burt v. Isthmus Development Company* (*supra*) a suit was brought at law by a United States citizen against a United States (Texas) corporation, in the Court of the latter's domiciliary state, upon a cause of action based upon a contract to be performed in Mexico. Certain work under the contract had been performed in Mexico; virtually all of the witnesses were in Mexico; and the civil law of Mexico was applicable. Virtually all the contentions raised by Petitioner in the instant case were raised by the defendant in the *Burt* case. The Fifth Circuit Court of Appeals, reversing the District Court, held that dismissal on the ground of inconveniens was improper and this Court denied certiorari. The Circuit Court said, in part (P. 357):

> ". . . we have found no cases in which a resident citizen suing in his own right was dispatched to a foreign court. It strikes us as being inconsistent with the very purpose and function of the Federal Courts to hold that one may decline to hear a case and thereby in effect decree that a citizen must go to a foreign country to seek redress of an alleged wrong."

The Court further said (P. 357):

> "Neither are we impressed by the allegations that appellee's operations are carried on primarily in Mexico. It must be remembered that appellee is a Texas corporation and that this suit was brought at

its domicile which its incorporators chose and established."

". . . surely it cannot complain of being sued at its headquarters and domicile on the ground that a major portion of its actual operations occurs elsewhere."

In *Swift & Co. v. Compania Colombiana,* 339 U. S. 684 (1949) this Court reversed an order of the lower Court vacating attachment of a vessel. In that case there were several libelants, only one of which was an American citizen; the respondents and the involved vessel were all foreign. The Court said (P. 697):

"We need not now decide the abstract question whether United States admiralty courts may decline jurisdiction over libels brought by United States citizens. Discretion could not sustain declination in this case. Application of forum non conveniens principles to a suit by a United States citizen against a foreign respondent brings into force considerations very different from those in suits between foreigners."

Where the libelant is a United States citizen, dismissal on the basis of forum non conveniens has been refused even in cases where the respondent is a foreign citizen and where the cause of action arose in tort in a foreign country. See *States Marine v. Kokei Maru,* 180 F. Supp. 255 (N. D. Cal. 1960), where the Court said (P. 258):

"It is possible that the various factors of convenience here involved might justify refusal of jurisdiction if this were a suit between foreigners. However, in this case the American nationality of libelant is an additional factor which we are entitled to consider of sufficient importance to justify the retention of jurisdiction, unless it appears that such retention would operate to deprive the foreign party of substantial justice."

See also *The Saudades,* 67 F. Supp. 820 (E. D. Pa. 1946), an action in admiralty by a citizen against a non-citizen in which the Court said (P. 821):

> ". . . the discretion of the Court, so far as it has any existence, is limited, and that mere inconvenience to the respondent, or to both parties, will not be considered a ground for exercising it to refuse jurisdiction."

Although the cases involving suits in United States Courts by foreigners against foreigners are not applicable to the instant case, it should be observed that in most such cases the Courts have refused to dismiss on the ground of forum non conveniens. In *Nestle's Products v. Osaka Shosen Kaisha,* 175 F. Supp. 876 (S. D. N. Y. 1959), the Court, denying a motion to dismiss said (P. 876):

> "Neither respondent's contention that Japanese law will apply (a contention which is not at all certain of being upheld), nor the fact that the witnesses are not readily available in this forum, are proper grounds for declining jurisdiction."

Petitioner (Pet. Brief P. 12) cites *Koster v. Lumbermen's Mutual Co.,* 330 U. S. 518 (1947), as an authority that Meneg's corporate domicile is entitled to "little consideration" under the doctrine of forum non conveniens. That case, like *Gulf v. Gilbert* (*supra*), involves only a denial of venue where the effect is to require removal from one United States Court to another. It was a derivative action in which there were potentially hundreds of plaintiffs or intervenors. This Court sustained a dismissal on the ground that, among other things, the convenience of the many unknown intervenors required that the suit be brought in the domiciliary state of the defendants. Petitioner's statement (Pet. Brief P. 12) that corporate domicile is entitled to "little consideration" is effectively an-

swered by the quotation from *Burt v. Isthmus* (*supra*) set forth on Pp. 8-9 of this brief.

Cuba R. R. Co. v. Crosby, 222 U. S. 473 (1912), cited by Petitioner, was an action at law for personal injury and did not involve jurisdiction or venue. It holds only that a plaintiff injured in a foreign jurisdiction must prove that the law of that jurisdiction affords him a right of recovery.

In summary it is submitted that dismissal of this suit would be a denial of jurisdiction, and an error of law based on those facts which are uncontroverted. It is further submitted that in all the relevant cases involving the question United States Courts have refused to dismiss suits by citizens under the circumstances herein applicable, and that no decision to the contrary can be found.

CONCLUSION.

It is respectfully submitted that certiorari should be denied because:

1. The controlling question is the right of a United States corporation (New York) and its wholly-owned subsidiary (Panamanian) to maintain an action in admiralty against a Delaware corporation in the United States District Court located in the state of the Petitioner's domicile. In such case even though the tort upon which the action is based occurred in a foreign country, and the question of conveniens is disputed and controversial, the Courts of the United States have never denied jurisdiction and relegated the citizen libelant to a foreign jurisdiction.

2. The interpretation and application of F. R. C. P. 52(a) has been determined by decisions of this Court. The decided cases in the several Circuits, including the decision of the Third Circuit Court of Appeals in the instant case, have correctly applied the law and such minor differences

as may exist between them are matters of expression rather than substance.

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